82-792

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UNITED STATES SUPREME COURT

GROVE CITY COLLEGE, individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENIFER S. SMITH and VICTOR E. VOUGA,

Petitioners,

vs

AFFIDAVIT IN OPPOSITION

T. H. BELL, Secretary of U.S. Department of Education; HARRY M. SINGLETON, Acting Assistant Secretary for Civil Rights, U.S. Department of Education,

Respondents.

STATE OF NEW YORK :
COUNTY OF MONROE : SS:
CITY OF ROCHESTER :

DAVID M. LASCELL, being duly sworn, deposes and says:

1. I am counsel of record in this case, argued November 29, 1983 before this Court.

2. I submit this affidavit in opposition to the application by the government to submit a supplemental memorandum.

3. I was informed on December 1, 1983 that the Solicitor General's Office wishes to file a supplemental memorandum to dispel confusion created by the oral argument and to outline the actual nature of the BEOG grants involved in this case. We perceived no confusion in the questions of the Court upon argument, and the nature of the grants involved here is already part of the Record. See Joint Appendix A-60, A-63, and A-26ff. Especially pertinent is the letter at A-30, which

describes the role of the government after the College refused to participate in the BEOG program.

4. Our memorandum opposing the consideration of the government's supplemental memorandum is attached. We believe that the government is attempting to reply to our latest brief and to questions by the Court in contravention of the Rules of this Court.

David M. Lascell

Sworn to before me this
1st day of December, 1983.

Eric Ward

ERIC WARD
Notary Public in the State of New York
MONROE COUNTY
Commission Expires March 30, 19.85

SUPREME COURT OF THE UNITED STATES
October Term, 1982

GROVE CITY COLLEGE, et al.

Petitioners,

No. 82-792

vs.

BELL, et al.

MEMORANDUM OF GROVE CITY COLLEGE

1. The government seeks to analyze this case, after argument, on the basis of what might happen, as opposed to what has happened during the course of this litigation. While the Secretary may claim the authority to eliminate the Alternate Disbursement System ("ADS"), in this case, students at Grove City have received assistance only through ADS and the College itself has received no federal money. Instead, the College has deliberately and consistently refused to participate in the BEOG program, whether via the ADS or the RDS system, a position the government has acknowledged. See letter, JA. 30. The case should be decided upon the record before the Court, not upon speculation about what the Secretary could do. The inconsistent positions of the Secretary are at the root of the problem; Grove City College has no predictable basis on which to act.

2. The government's proposed supplemental memorandum repeats the fallacious argument that the meaning of recipient under Title IX can only be understood by reference to the BEOG program, a position already argued by the government. Both Title IX and the BEOG program were parts of the omnibus Education Amendments of 1972, which involved many varieties of direct federal assistance to educational institutions. Congress' decisions regarding the scope of Title IX therefore are not dependent on any one federal program -- Title IX was meant to be applied to both existing and future means of providing federal financial assistance. Receiving federal financial assistance, as we have argued in our principal brief, takes its meaning from the conscious adoption in Title IX of the "program-specific" language used in Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq., where both the meaning of "Federal financial assistance" and "receiving" are well defined in the legislative history. See Pet. Br. at 28-33. How that assistance was to be provided, and, indeed, whether assistance to an educational program or activity was to be created, could be determined by future Congresses or by administrative regulation.

3. It is possible, therefore, for Title IX applicability to hinge upon the administrative discretion of the Secretary, if he is vested with that authority by Congress, or with the Congress itself.

4. Contrary to the government's newly articulated position, it appears that Congress did affirmatively contemplate that the Secretary calculate BEOG awards and send them directly to students. It was only later that the Secretary, acting pursuant to the authority vested in him by the BEOG statute (§ 20 U.S.C.A. § 1070a(b)(1)(?)(A)(West 1982 P.P.)), created a disbursement system which allowed institutions to receive, calculate, and disburse BEOG funds.

As written in 1972, and not significantly changed today, the BEOG statute requires that:

> The Commissioner shall . . . pay to each [eligible] student . . . a basic grant . . .

20 U.S.C. § 1070a(a)(1)(West 1982 P.P.). In contrast, the companion Supplemental Educational Opportunity Grant (SEOG)[1/] program operates "to provide, through institutions of higher education, supplemental grants to assist in making available the benefits of post secondary education to qualified students . . ." See 20 U.S.C. § 1070b(a)(West 1982 P.P.). The SEOG program also enacted

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1/ Grove City does not participate in the SEOG program.

in the 1972 Education Amendments, was the direct successor to the existing Educational Opportunity Grants Program contained in the Higher Education Act of 1965. See P.L. 89-329, Tit. IV, Section 401 (1965). Congress was thus conscious in 1972 that the usual means for disbursement of student assistance grants was through institutional participation. Yet, in the BEOG program it provided for a direct disbursement method.[2/]

5. Despite the government's new contentions, the result of these legislative choices is clear. Congress determined that direct aid to individual beneficiaries did not constitute federal financial assistance to a program or activity. The BEOG statute contemplates the provision of direct grants to students. The Secretary recognized this fact through the creation of the ADS. Grove City refused participation in the BEOG program, a fact recognized by the government, which provided direct

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2/ The original BEOG statute does not clearly contemplate institutional disbursement of BEOGs, although discretion to determine forms of payment was vested in the Secretary. See 20 U.S.C.A. § 1070a(b)(1)(3)(A)(West 1982 P.P.) A later amendment, added in 1976, demonstrates Congressional recognition that the Secretary was distributing BEOG funds through educational institutions. See 20 U.S.C.A. § 1070a(c), added by P.L. 94-328(1976).

grants to students nonetheless. In these circumstances, Grove City College does not become a recipient of Federal financial assistance.

December 1, 1983

Respectfully submitted

NIXON, HARGRAVE, DEVANS & DOYLE

By _____
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